

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-936

April 4, 2007

STEVEN RALPH TEATER
APPELLANT

AN APPEAL FROM OUACHITA
COUNTY CIRCUIT COURT
[CR03-027]

V.

HON. EDWIN A. KEATON, JUDGE

STATE OF ARKANSAS
APPELLEE

REVERSED AND REMANDED

This is the second appeal in this homicide case. Steven Teater was charged with the first-degree murder of his wife, Becky Teater, and the attempted first-degree murder of her friend, Rod McKinney. A Ouachita County jury found him guilty of second-degree murder and attempted second-degree murder. We reversed the convictions and remanded for a new trial because the trial court erroneously refused to give an instruction on the affirmative defense of mental disease or defect. *See Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005). Appellant was retried; however, the trial court again refused to give the instruction. Appellant was again convicted of second-degree murder and attempted second-degree murder, for which he received a thirty-year term in the Arkansas Department of Correction.

He again asserts that the jury should have been instructed on the defense of mental disease or defect. We agree; therefore, we reverse and remand for a third trial.

Most of the facts are set out in our first opinion; therefore, this opinion will only recount those facts relevant to appellant's affirmative defense. The homicide and attempted homicide occurred on January 18, 2003. Becky died as a result of multiple gunshot wounds; McKinney survived. Appellant called a friend soon after the shooting and told him that he killed Becky because she was having an affair with McKinney. When apprehended by Camden Police, he stated that he shot Becky because she was cheating on him.

Dr. Bradley Diner, a psychiatrist, testified on appellant's behalf at both trials. According to Dr. Diner's testimony at the first trial, appellant had no "active, current psychiatric disorder" and could appreciate the wrongfulness of the acts in question. *Teater, supra*. Dr. Diner believed that Teater experienced a dissociative episode where he blocked out the shooting from his memory. *Id.* However, Dr. Diner also testified at the first trial:

Because of the way [Teater] handles emotional feelings and stress I think that he was overwhelmed and when he saw Becky and Mr. McKinney together I think that was too much for him and I think this erupted in the aggressive act. That inability to conform can be a very limited period of time.

Id. at 219, 201 S.W.3d at 444. During the first trial, the State produced a rebuttal witness, Dr. William Peel, who testified that appellant had the capacity for purposeful and knowing conduct at the time of the shootings and that he "was capable of knowing right from wrong and of conforming his behavior to the rules of the law, should he have chosen to do so." *Id.* at 219, 201 S.W.3d at 445.

At the close of evidence at the first trial, appellant sought an instruction on mental disease or defect. The trial court rejected the instruction, and appellant was convicted of second-degree murder and attempted second-degree murder. Appellant appealed to this court, arguing that the jury should have been instructed on the affirmative defense of mental disease or defect. The State conceded error, but argued that omission of the instruction constituted harmless error. We agreed that appellant was entitled to the instruction, stating:

In this case, there was testimony from two expert witnesses, Dr. Bradley Diner and Dr. William C. Peel. Dr. Diner opined that, although he could not diagnose Teater with a specific mental disease or defect, Teater had a defect in his personality structure and ability to handle stress that limited his ability to conform his conduct to the requirements of the law when he killed his wife and shot Rod McKinney. . . . Because the issue of Teater's sanity at the time of the shootings was a fact question for the jury, we hold that the trial court should have instructed the jury concerning the defense of mental disease or defect.

Id. at 220-21, 201 S.W.3d at 445-46. We also held that such an error was not subject to harmless-error review; therefore, we reversed appellant's convictions and remanded for a new trial.

At the second trial, Dr. Diner explained the affirmative defense of not guilty because of mental disease or defect: that a person has a mental disease or defect and, as a result, is unable to appreciate the criminality of his actions or cannot conform his behavior to the requirements of the law. Dr. Diner then recounted appellant's history. Appellant and Becky were married in 1979, and the marriage was going well until the late 1980s, when Becky started having several affairs. The couple divorced in early 1988. Appellant took Becky back in July 1988 and at some point contracted a sexually transmitted disease from her.

However, he and Becky rebuilt the marriage. The next ten to twelve years went well, but Becky started cheating again. At one point, Becky told appellant that she was taking notary public classes, and she left every Wednesday for two or three hours to take these alleged classes. Appellant discovered that there were no such classes and eventually discovered that Becky was cheating again. On the day of the shooting, appellant had decided that he was going to make her admit having an affair with McKinney and make her apologize.

Dr. Diner testified that appellant's mental defect did not reach the proportion necessary for him not to be able to conform his conduct to the requirements of the law and that while appellant did not meet the criteria for an insanity defense, he was seriously emotionally disturbed and under a tremendous amount of stress. This, according to Dr. Diner, compromised appellant's decision making and contributed to him shooting Becky and McKinney. Dr. Diner's report was also admitted into evidence. His report concluded:

While Mr. Teater has no overt, sustained psychiatric illness, his manner of coping with stress and emotionally charged material indicates that he is quite liable to decompensation in situations which threaten his rigid view of the world. Though he was fully capable of appreciating the wrongfulness and criminality of his behavior, his ability to conform his conduct was extremely limited. The provocation which resulted from the awareness of his wife and her lover created a state in which his rationality was compromised by the passion of the situation and would have likely inflamed anyone with his background. It certainly provides a reasonable explanation for his behavior. Though he certainly understands that murder is wrong, because of his personality and way of handling this type of stress[,] Mr. Teater's defective [sic] mental state impaired his ability to conform his behavior to the requirements of the law.

At the close of evidence, appellant sought an instruction on the affirmative defense

of mental disease or defect.¹ The State objected. While it noted that this court had reversed appellant's previous conviction for failure to give the instruction, the State argued that Dr. Diner's testimony had changed to the point that appellant was no longer entitled to the instruction. Specifically, the State argued that Dr. Diner's testimony established that appellant had no mental disease or defect. The trial court agreed with the State and refused to give the instruction. It noted Dr. Diner's testimony that appellant had some impairment, but the court stated that the impairment did not rise to the level of an inability to conform his behavior to the requirement of the law. The jury was explicitly instructed not to consider the affirmative defense of mental disease or defect. After deliberations, the jury found appellant guilty of second-degree murder and attempted second-degree murder, for which

¹Appellant proffered instructions based upon AMI Crim. 2d 609 and 610:

[AMI Crim. 2d 609] STEVEN RALPH TEATER asserts the affirmative defense of mental disease or defect. If, after considering all the evidence, you are convinced beyond a reasonable doubt that STEVEN RALPH TEATER engaged in the conduct alleged to constitute the offence, you should then consider the defense of mental disease or defect.

A person is not criminally responsible for his conduct if at the time of that conduct, as a result of mental disease or mental defect, he lacked that capacity either to appreciate the criminality of his conduct or to confirm [sic] his conduct to the requirements of the law.

. . . .

[AMI Crim. 2d 610] If you find that the defense of mental disease or defect has not been established, evidence that STEVEN RALPH TEATER suffered from a mental disease or defect may still be considered by you in determining whether STEVEN RALPH TEATER had the required mental state to commit the offence [sic] charged or a lesser included offence.

he received a thirty-year term in the Arkansas Department of Correction.

Appellant argues that the trial court erred in failing to instruct the jury on the affirmative defense of mental disease or defect. He contends that the law-of-the-case doctrine requires that the instruction be given to the jury. He further contends that regardless of law of the case, he presented sufficient evidence to have the issue submitted to the jury. The State argues that the facts between the first trial and the second trial have changed to the point where law of the case is no longer applicable and that the evidence does not support an instruction on mental disease or defect.

In appellant's first appeal, we explained:

A party is generally entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. Mental disease or defect is an affirmative defense and the burden rests upon the appellant to prove that he lacked the capacity, as a result of mental disease or defect, to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. To entitle the appellant to a jury instruction on mental disease or defect, there must be some indication from the evidence that he lacked the appreciation that sane men have of what it is doing and of its legal and moral consequences.

Where there is conflicting testimony on the question of a defendant's sanity at the time of the offense, the issue is a fact question for the jury to decide. The jury alone determines what weight to give the evidence, and may reject or accept all or any part of the evidence that it believes to be true.

Id. at 220, 201 S.W.3d at 445 (citations omitted).

The doctrine of law of the case ordinarily arises during a second appeal and requires that matters decided in the first appeal be considered concluded. *Johnson v. State*, 363 Ark. 463, — S.W.3d — (2005). This is the case even if the first decision was wrongly decided.

Clemmons v. Office of Child Support Enforcement, 345 Ark. 330, 47 S.W.3d 227 (2001).

The doctrine is not inflexible and does not absolutely preclude correction of error, but it prevents an issue raised in a prior appeal from being raised in a subsequent appeal unless the evidence materially varies between the two appeals. *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999). However, matters that have not been decided, explicitly or implicitly, do not become law of the case merely because they could have been decided. *Johnson*, *supra*.

We hold that the law-of-the-case doctrine mandated that the trial court instruct the jury on the affirmative defense of mental disease or defect. At issue is whether Dr. Diner's testimony at the second trial materially varied from his testimony at the first trial as to render the law-of-the-case doctrine inapplicable. While Dr. Diner may not have explicitly stated an opinion about whether appellant's mental state was to the level to justify an insanity defense in the first trial, he did state then that appellant had a limited ability to conform his conduct to the requirements of the law when he shot Becky and McKinney. This testimony is similar to the testimony given at the second trial and is consistent with his written report. Dr. Diner's explicit testimony that appellant did not suffer from legal insanity, while possibly persuasive on the ultimate issue, is of no consequence in light of his testimony that appellant had diminished ability to conform to the requirements of the law. By relying on Dr. Diner's explicit opinion that appellant did not suffer from legal insanity, the trial court ran afoul of the Arkansas Supreme Court's interpretation of Ark. R. Evid. 704. The rule provides that opinion testimony that embraces an ultimate issue to be decided by the trier of

fact is not necessarily objectionable. However, in decisions interpreting the rule, the supreme court has still rendered objectionable testimony that “tells the jury what to do.” *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002); *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998); *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1981). While Dr. Diner opined that appellant did not meet the definition of legal insanity, the jury could possibly rely on the rest of his opinion and conclude that appellant was not guilty by reason of mental disease or defect. Under the law-of-the-case doctrine, we are bound to hold that his testimony supports an instruction on mental disease or defect.

We also hold that appellant was entitled to the instruction even without considering the law-of-the-case doctrine. Although Dr. Diner testified that appellant did not meet the criteria for an insanity defense, he still testified that appellant suffered from a diminished capacity that limited his ability to conform his conduct to the requirements of the law. Where there is even the slightest evidence to warrant an instruction, it is error to refuse it. *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991).

For these reasons, the trial court erred a second time in refusing to instruct the jury on the affirmative defense of mental disease or defect. We reverse appellant’s convictions and remand for a third trial.

Reversed and remanded.

HART and BAKER, JJ., agree.